Editor's note: See U.S. v Harlin H. Foresyth, 100 IBLA 185, 94 I.D. 453, (Dec. 8, 1987).

UNITED STATES
v.
HARLAN H. FORESYTH

IBLA 73-166 Decided February 28, 1974

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., in Colorado Contest No. 425, finding Avenger Claims Nos. 3-6, 13-25 null and void for lack of a discovery, and dismissing contest proceedings against Avenger Claims Nos. 1, 2, 7-12.

Set aside and remanded.

Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Discovery: Marketability

> Although a deposit of limestone may be considered an uncommon variety within section 3 of the Act of July 23, 1955, if suitable for chemical or metallurgical use or for use in the making of cement, it is still necessary to show a reasonable prospect that the limestone can be mined, removed and marketed at a profit in order to satisfy the requirements for discovery under the general mining laws.

Withdrawals and Reservations: Generally--Withdrawals and Reservations: Effect of--Public Records

> The requirements of 43 CFR 2351.2(b) are mandatory and all applications seeking withdrawals of land must contain the information requested before such applications may be granted; applications which are incomplete are nevertheless properly noted on public records.

Mining Claims: Generally--Withdrawals and Reservations: Effect of--Public Records

> The notation on public records of a request for withdrawal, even though the request is incomplete on its face, has a segregative effect on land included in a mining location already made and on which there are ongoing operations looking toward the establishment of a discovery of a valuable mineral deposit, since such a request is an application within the ambit of 43 CFR 2091.1. However, such segregation does not preclude the taking of samples of existing exposures in order to demonstrate validity of the claims.

APPEARANCES: R. Lauren Moran, Esq., Lohf & Barnhill, P.C., Denver, Colorado, for contestees; Rogers N. Robinson, Esq., Office of the General Counsel, United States Department of Agriculture, Denver, Colorado, for contestant.

OPINION BY MR. HENRIQUES

Contestees appeal from that part of the decision of Administrative Law Judge John R. Rampton, Jr., finding Avenger claims Nos. 3-6, and 13-25, inclusive, null and void for lack of discovery of a valuable mineral deposit. Contestant appeals from that part of the decision of the Judge which dismissed the complaint against the Avenger claims Nos. 1-2, 7-12, inclusive.

The contest was initiated by the Bureau of Land Management at the request of the Forest Service, Department of Agriculture, on August 2, 1967. The complaint alleged that:

(a) No valuable mineral deposit has been discovered within the limits of the claim.

(b) The claims were located in 1966 for a common variety not locatable under the provisions of Public Law 84-167, the Act of July 23, 1955.

Contestees denied the charges.

On September 14, 1969, contestant filed a written request to amend the complaint to allege that the claims are improperly located as lodes. This motion was granted by the Judge on October 14, 1969. Before discussing the hearing, however, it is necessary, because of the unusual posture of this case, to examine in some detail the chronology of certain events which occurred prior to and during the hearing.

The claims were located at various times in 1966, in secs. 29, 30, 31, and 32, T. 12 S., R. 68 W., and sec. 5, T. 13 S., R. 68 W., 6th P.M., Teller and El Paso Counties, Colorado, within the Pike National Forest. After the location of the claims, it was decided that the drilling of core holes was needed to ascertain the extent of the deposit. Therefore, in June of 1967 contestees obtained the use of a bulldozer to clear a road for the drillers. While the bulldozer was on the land, Robert Poole, an employee of the U. S. Forest Service, having been alerted to the operation by a neighbor, arrived on the scene and ordered the bulldozer operator to cease his activities. 1/ At a subsequent meeting on July 5, 1967, Forest Service employees advised the claimants that no further work should be done on the land and that if any were attempted an injunction would be sought. Furthermore, the claimants were informed that a contest against the claims would be instituted. As we noted, supra, a contest was initiated on August 2, 1967.

A prehearing conference was held on May 7, 1968, for the purpose of obtaining certain stipulations, admissions of fact and agreements about the introduction of documents. At that time both contestant and contestees agreed that joint sampling and core drilling would occur prior to the hearing. Unknown to contestees, or to the Judge, or even, apparently to contestant's attorney, procedures had been initiated in February to withdraw the land from mineral location. This important point was within the knowledge of a number of Forest Service personnel who were present at the meeting but all maintained their silence, despite the fact that such action might have a critical effect on the resolution of the contest. On July 17, 1968, an application from the Department of Agriculture for the withdrawal of the subject land was filed in the BLM office in Denver, Colorado, and it was noted on the official land status records.

1/ In actuality, the bulldozer was not operating when Poole arrived on the scene, as it had broken down (Tr. 502).

The joint sampling, which had been ordered at the prehearing conference on May 7, 1968, was commenced within the month and continued through September, October and November of that year, and into 1969.

A second prehearing conference was held on August 26, 1969. This second prehearing conference was necessitated by the difficulties involved in that another contest, entitled United States v. Batley, Colorado Contest 426, was in progress dealing with the same land. These latter mineral claimants had located placer claims for the same limestone deposits subsequent to the lode locations of the contestees herein. At this prehearing conference these second mineral claimants relinquished their claims and the Judge dismissed Colorado Contest 426 (PH-II at 8). 2/ At this prehearing conference the Forest Service admitted that Avenger Claims Nos. 8, 10 and 12 contained high calcium limestone which was not of a common variety. It was decided that the hearing would commence on Thursday, November 20, 1969.

In November, prior to the hearing, contestees prepared to remove 2,000 tons of limestone for testing by a sugar factory. Contestant thereupon went into Federal District Court and obtained a temporary restraining order. On January 14, 1971, the District Court, in United States v. Foresyth, 321 F. Supp. 761 (D. Colo. 1971), granted a temporary injunction. Contestant had argued two grounds for granting the injunction: "(1) great and irreparable injury to the land from such activities, and/or (2) the validity and effect of the request for withdrawal." Id. at 764. Contestees had attacked the withdrawal application as fatally defective. The Court declined to rule on this question as it felt it was a matter properly to be decided by the agency:

> Insofar as a ruling on the validity and effect of the request for withdrawal is crucial to a determination of defendants' rights in the administrative proceeding, it must be concluded that the administrative agency is responsible for making this ruling and that the Court is not free to consider the question until the administrative remedies have been exhausted. [footnote omitted].

Id. at 766. The Court held that it was "unnecessary to determine the withdrawal question in order to issue the temporary injunction because the first ground asserted by plaintiff therefor--irreparable injury to Government- owned lands--is sufficient." Id.

2/ The following abbreviations will be used in reference to the record: Prehearing conference I and II--PH-1, PH-II; transcript--Tr.; the Judge's decision--Dec.

The hearing was commenced on November 20, 1969, and continued with various recesses until January 9, 1970. This hearing itself was not without its difficulties. One of the Government's expert witnesses, Sidney F. Adams, was taken ill during the proceedings and his testimony was not completed until January 8. Thus, the Government was in the anomalous position of closing its case-in-chief in the middle of its rebuttal of contestees' case. Needless to say, this factor did not aid in making the case record more coherent.

The hearing was ended on January 9, 1970. It was reopened on November 29, 1971, at the request of contestees so that they could submit certain additional evidence going to the validity of the withdrawal and the percent of chemical grade limestone found on the claim pursuant to the Departmental decision in United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331 (1969). The reopened hearing concluded on December 1, 1971. Both parties submitted extensive briefs to the Judge. The Judge in his decision of September 18, 1972, found: 1) the withdrawal application was fatally defective and could be given no force or effect; 2) that considering all of the evidence, regardless of when it was obtained, the Avenger Claims Nos. 3-6, 13-25, inclusive, were null and void, but that contestees had shown, by a preponderance of the evidence, that a discovery of a valuable mineral deposit had been made on Avenger Claims Nos. 1, 2, 7-12 inclusive.

Because of the importance of the withdrawal question to the admissibility of evidence, we will deal with that question before examining the evidence in the record relating to discovery. At the outset we desire to make crystal clear what we are not dealing with. We are not dealing with a withdrawal, but rather only with an application for a withdrawal. Nor are we dealing with the substantive basis of the application for withdrawal. Rather our focus is on the question of whether it is mandatory or necessary to satisfy all the requirements of the applicable regulation before the segregative sanctions provided by regulation attach, or whether posting of the application for withdrawal, even though it is incomplete, to the land office records and publishing notice of the application in the Federal Register triggers the segregation of the land. As shown infra, we hold that posting of the application to the records effects the segregation of the described land.

There can be no question that for the claims to be valid a discovery of a valuable mineral deposit must be shown to have existed prior to a valid withdrawal. Cases so holding are legion. See e.g., Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968),

cert. denied, 393 U.S. 1066 (1969); United States v. Charleston Stone Products, Inc., 9 IBLA 94, 99 (1973), United States v. Gunsight Mining Co., 5 IBLA 62, 64 (1972), United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285 (1971). A proper application for withdrawal has the same segregative effect, 43 CFR 2091.2-5(a). There is, however, a great difference between requiring that a discovery be shown to have existed prior to a withdrawal and requiring that the discovery must be proven prior to the withdrawal. Acceptance of the latter proposition as the standard which must be met could well lead to the conclusion that samples taken from a claim prior to a withdrawal could not be considered in determining the validity of the claim unless the results of the assays were communicated to the mineral claimants before the land was withdrawn. We know of no justification for such a result.

We think the rule to be applied is that stated in United States v. Converse, 72 I.D. 141 (1965), aff'd 262 F. Supp. 583 (D. Ore. 1966), aff'd 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). In that case the issue involved was not whether a discovery o a valuable mineral deposit existed at all, but whether it had existed prior to July 23, 1955, so as to exclude the claim from the effects of sec. 4 of the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 612 (1970), relating to the control and management of the surface of mining claims. On appeal from a finding of no discovery as of July 23, 1955, contestee had argued that the Hearing Examiner had unfairly allowed the Government to submit the results of assays taken after July 23, 1955, while it had excluded similar evidence presented by the contestee. In affirming the decision of the Hearing Examiner, the Department examined this allegation and declared:

> * * * It was therefore necessary, in order to establish the fact of a discovery prior to July 23, 1955, to demonstrate such discovery on the basis of showings of mineral value from portions of the claims exposed prior to that date. It was for this reason that the hearing examiner rejected most of the appellant's evidence based upon mineral showings exposed at a subsequent time.
>
> Contrary to the allegation of the appellant, the hearing examiner did not apply one rule of evidence to the contestant and a different rule to the mining claimant in admitting into evidence assays of samples of ore taken by the contestant after July 23, 1955.

> It was the date of exposure of the source of the ore sample and not the date of the taking of the sample that determined whether or not a sample was proper evidence. (Emphasis supplied).

Id. at 146.

In United States v. Gunsight Mining Co., supra, this Board declared that:

> [W]e cannot consider the drilling, sampling and other activities pursued on the claims after May 27, 1955, for any purpose other than the extent to which such geological investigations may tend to support an assertion that valuable deposits of minerals had been physically disclosed within the boundaries of each of the claims prior to that date. (Emphasis supplied).

Id. at 64.

Thus, evidence in the case at bar was admissible to the extent that it confirmed and corroborated pre-existing exposures of a valuable mineral deposit, even assuming the withdrawal application segregated the land from mineral location. Whether the application, in point of fact, effected any segregation is the question to which we now turn.

We note that the Judge limited his consideration of the withdrawal to the parameters outlined above. His particular concern was whether the application for withdrawal had complied with 43 CFR 2351.2(b), which states:

> No specific form of application is prescribed but it must contain the following information:
>
> (1) The name and address of the applicant agency and intended using agency;
>
> (2) Legal description of the lands desired, in terms of the public land surveys, where applicable;
>
> (3) When sections 1, 2, and 3 of the Act of February 28, 1958 (72 Stat. 27), are applicable, location of the area involved, to include a detailed description of the exterior boundaries of the lands to be included within, and those to be excepted from, the proposed withdrawal or reservation.

(4) Gross acreage within the exterior boundaries of the requested withdrawal or reservation, and net public land, water, or public land and water acreage covered by the application;

(5) The purpose or purposes for which the area is proposed to be withdrawn, reserved, or restricted, or if the purpose or purposes are classified for national security reasons, a statement to that effect;

(6) Whether the proposed use will result in contamination of any or all of the requested withdrawal or reservation area, and if so, whether such contamination will be permanent or temporary;

(7) The estimated period during which the proposed withdrawal or reservation will continue in effect;

(8) Whether, and if so to what extent, the proposed use will affect continuing full operation of the public land laws and Federal regulations relating to conservation, utilization, and development of mineral resources, timber and other material resources, grazing resources, fish and wildlife resources, water resources, and scenic, wilderness, and recreation and other values;

(9) If effecting the purpose for which the area is proposed to be withdrawn, reserved, or restricted, will involve the use of water in any State, whether subject to existing rights under law, the intended sing agency has acquired, or proposes to acquire, rights to the use thereof in conformity with State laws and procedures relating to the control, appropriation, use, and distribution of water.

(10) A justification for the proposed withdrawal or reservation, including statements showing the need for all the area requested and for the limitation, if any, of concurrent uses;

(11) Citation of the statutory or other authority for the type of withdrawal or reservation requested.

The Judge ruled that these are mandatory requirements. We agree, but hold that they may be satisfied at any time prior to final adjudication of the application for withdrawal. The subject application, being prima facie valid, was properly noted to the

land office records, thereby effecting a segregation as provided by 43 CFR 2091.2-5. As this notation was made on July 18, 1968, it became incumbent upon the mining claimants to show a discovery of a valuable mineral deposit on each claim as of that time, as well as of the time of the hearing.

The Judge found that of these requirements compliance had not been established in four instances. He listed these informational omissions as:

> (1) The intended using agency.
>
> (2) The purposes for which the land is proposed to be withdrawn.
>
> (3) The estimated period during which the proposed withdrawal would continue in effect for the extent for which the proposed withdrawal will affect full operation of public land laws pertaining to development of mineral resources by the need for the area requested.
>
> (4) The statutory or other authority for the type of withdrawal.

(Dec. 8).

Contestant contends that he Judge erred in finding that the application did not fulfill the requirements of 43 CFR 2351.2(b). To examine this contention we will discuss each point seriatim.

Contestant contends that "the request shows that the intended using agency is the Forest Service, United States Department of Agriculture." This is obvious, it argues, from the fact that the lands were already national forest lands, and that the request was signed by the Chief of the Forest Service. 3/ Further, it

---

3/ It should be pointed out that the Chief of the Forest Service did not sign the request for withdrawal in that capacity, but rather as Acting Assistant Secretary of the Department of Agriculture. One month later the Assistant Secretary provided the Interior Department with a letter stating his concurrence. If the Chief of the Forest Service was acting in his capacity as head of the Forest Service he would have no authority to request a withdrawal of the land since 43 CFR 2351.1 limits the making of applications for withdrawal to "[t]he heads of Federal agencies and instrumentalities or any subordinate officer designated by them * * *". As the Forest Service Manual notes:

points out that the notice of withdrawal, published in the Federal Register by the Acting Land Office Manager, stated that the Forest Service had filed an application for the withdrawal of public lands which were "in use for, or are proposed for public purposes." We are not disposed to accept contestant's argument that the inference of what was to be the intended using agency was so clear as to obviate the need for the simple statement that the intended using agency was the Forest Service. The regulation states that: "[n]o specific form of application is prescribed but it must contain the following information * * *" 43 CFR 2351.2(b). (Emphasis supplied). We hold that the word "contain" means more than the arguable presence of unarticulated inferences or hidden clues which may or may not be discovered from a perusal of the application. The regulations permit the applicant agency to utilize any "form of application" it deems proper; the regulations require it to state various information. This was not done here.

Secondly, the Judge held that the documents did not set forth the purpose for which the land is proposed to be withdrawn. The contestant's brief on appeal begins:

> The request is for the withdrawal of approximately 970 acres of public land from mineral location and entry under the mining laws. That is the purpose for which the land is proposed to be withdrawn.

If contestant is contending that the effect of the withdrawal is its "purpose", in the sense that the word "purpose" is used in the regulations, it is also saying that any request for withdrawal, by its nature, states its purpose. We doubt that the regulations were adopted with such an end in mind. On the other hand, if the only purpose of the withdrawal was the prevention of mining, it is open to grave doubt whether such an application would be proper. It is to be noted that sec. 1 of the Act of June 4, 1897, 30 Stat. 36, 16 U.S.C. § 478 (1970), referred to as the

---

(fn. 3 Cont.)

"By Executive Order 10355, the authority to request withdrawal of National Forest lands from mineral entry may be delegated by the Secretary of Agriculture only to an officer of the Department required to be appointed by the President by and with the advice and consent of the Senate, and this authority has not been redelegated. Therefore, Forest Service requests are made through the Secretary of Agriculture to the Department of the Interior." (Emphasis added). Forest Service Manual 2860.1.

Forest Service Organic Act, provides in reference to national forests that nothing contained therein shall "prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof."

The national forests were established under a statutory framework which expressly provided that mining activities were to be permitted. We have no quarrel with the proposition that there are a number of purposes for which it would be entirely proper to withdraw land from mineral location, but to seek to withdraw land simply to prevent mineral development with no reference to any other desired end flies in the face of specific Congressional mandates.

We think that the real purpose of the withdrawal is provided in the justification statement though scarcely with the specificity that would be desirable. We think as well that the justification statement may properly be considered part of the application, since it is referred to therein and it accompanied the application. Thus, we conclude that for this reason the Judge erred in finding that the application did not state the purpose of the withdrawal.

The Judge further found that there was no statement of the expected duration of the withdrawal. Contestant answers this finding with a rather lengthy exegesis on the nature of Executive withdrawal power. We do not believe the discussion is relevant to the issue of the length of time the withdrawal is to be in effect. Contestant's declaration that "the documents satisfactorily show the withdrawal was to be permanent" is clearly a conclusion drawn by contestant. Nowhere does the application so state. Once again we are asked to read into the application a simple statement which contestant neglected to include. We decline to so act and affirm the Judge's findings.

Finally, the Judge held that the documents did not set forth the statutory or other authority for the type of withdrawal. The application, however, did state that it was made under the authority vested in the Department of the Interior by Executive Order #10355 of May 26, 1952 (17 F.R. 4831). We think that this information met the requirements of the regulation, and therefore we reverse the finding of the Judge on this issue.

We do not wish to indicate that we are requiring a format which has heretofore been ignored by the Department of Agriculture. We have appended to this decision part of exhibit 1 to section 2861.2-3 of the Forest Service Manual which gives an example of the format to be followed by the Forest Service in requesting withdrawals. As is readily apparent the example has only an attenuated relationship to the document submitted herein for the requested withdrawal. Had a format substantially similar to the example been followed none of the subsequent difficulties would have occurred. We expressly find that the withdrawal application is defective and as a matter of law cannot be allowed until all the defects have been corrected.

This does not end the analysis, however. Rather, we believe that the question of whether the noting of the records has a segregative effect independent of the final acceptability of the application for withdrawal, a question not considered by the Judge, is determinative of the effect of the withdrawal application on the appellants. The regulation, 43 CFR 2091.2-5(a) declares:

> The noting of the receipt of the application under §§ 2351.1 1 [sic] to 2351.6 in the tract books or on the official plats maintained in the appropriate Land Office shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands.

The regulation speaks simply of an "application." This Department has consistently held that notation on tract records of prior appropriations effectively precludes the acceptance of a subsequent application, even though the notation itself is in error. We believe there is no justification for any departure from this practice because of those defects or deficiencies apparent in the application, herein. These defects cannot defeat the segregation effected by posting of the application to the land office records. The intent that a withdrawal is being sought for land specifically described by legal subdivision is obvious from merely looking at the application. Protection of the public land and its

resources from later adverse claims is of greater importance than meticulous attention to all details called for in the regulations before posting of the application to the records. We do not consider it to be an error that the posting of this withdrawal application was made prior to its complete compliance with the regulations, though the failure to fully comply, until remedied, would bar ultimate approval of the application.

We also find however, that as the claims of these appellants were asserted prior to the date of posting of the application for withdrawal, evidence in support of their allegations of validity obtained from the sampling of pre-existing outcroppings after the date of posting was properly admitted by the Judge.

The testimony in this case was quite lengthy, and the Judge's decision contains an excellent summation thereof (Dec. 10-16). Despite the great mass of testimony adduced we are nevertheless constrained to hold that insufficient evidence exists on a number of points which requires us to order a remand for a further hearing. Because of this disposition of the case we will not set forth a summary of the evidence on all issues, but will confine ourselves to a discussion of areas of particular difficulty.

Relating to testimonial evidence, contestant presented a number of witnesses. Warren Roberts, a mineral examiner employed by the United States Department of Agriculture, examined the visible outcroppings and stated that he did not believe that a discovery of a locatable mineral had occurred (Tr. 134). While admitting that a number of assay results showed the presence of chemical grade limestone, Roberts also declared that further work would be necessary to determine the quantity of the chemical grade. 4/ Sidney Adams, a retired mining engineer, estimated that, on the basis of a twenty-foot high bed of high-grade limestone, and utilizing the open-stope and benching method, the mining costs would be $6.40 a ton for a return of approximately $3.00 a ton (Tr. 1103). Adams admitted that the existence of one or more beds of chemical grade limestone of as much as 100 feet in thickness would change his calculations.

4/ We note that Roberts in a report on the mining claims dated May 12, 1969, declared: "In my opinion, a discovery has been made on the Avenger #10, insofar as quality and quantity are concerned. To date, the claimants have not shown that a market exists." He continued:

"It is recommended that the claimants be given a reasonable time (6 months?) to show they have a present, continuing market for chemical grade limestone. This implies they be given an opportunity to mine the limestone to supply a market." (Exhibit M-13 at 5).

John Lewis, a Professor of Geology at Colorado College, testified that the limestone formation was lenticular in nature and that it was unlikely that one would find extensive thicknesses of "high-grade" limestone (i.e., 95 to 97 percent calcium carbonate) capable of being mined (Tr. 380). James MacIntosh, a mining engineer employed by the Bureau of Land Management testified that if the deposit was mined by underground methods the cost would be about $7.00 a ton and in excess of any return (Tr. 1072). MacIntosh then testified that if he were a private prospector he would have located claims on the deposit (Tr. 1080).

Contestees, for their part, presented testimony of their own activities. Harlan Foresyth, one of the contestees and the original locator of the claims, described his samplings of the deposit. Don Peaker, another contestee and a graduate of the Colorado School of Mines, then independently confirmed Foresyth's results, and decided to join the venture (Tr. 743-747). Earl Brubaker, an executive of several companies engaged in construction, road building and other work, was contacted by Peaker and Foresyth, in order to provide needed entrepreneurial skills for the development of the claims. Brubaker testified as to the arrangements he had made for testing and an evaluation of the claims. He contracted for the construction of a road into the property to provide access for drilling equipment. This work, commenced in June of 1967, was quickly halted by the Forest Service (Tr. 966-967, 975). He was subsequently advised that if any further work on the claims

---

(fn. 4 Cont.)

This exhibit also brings into doubt the actions of the Forest Service in its dealings with the Bureau of Land Management. The Colorado State Director for the BLM wrote to the Regional Forester on September 19, 1968, regarding the withdrawal and stated that:

"* * * our recommendations as to whether the withdrawal should be completed will depend upon the mineral character of the land involved. The material we have with the record file is not adequately descriptive of the mineral potential of the land. We would appreciate your providing us with a detailed mineral report so that the merits of the protests can be determined." (Exhibit M-9).

The Assistant Regional Forester replied, by letter of October 4, 1968, that they hoped that the examination could be completed early in the summer of 1969 (Exhibit M-10). On January 30, 1970, more than a year later, the Acting State Director, BLM, asked for a status report (Exhibit M-11). On February 4, 1970, in a reply sent for the Regional Forester, the BLM was advised that, as regards the land in issue:

was attempted, an injunction against the mineral claimants would be obtained (Tr. 726). This warning occurred on July 5, 1967, over a year before any application for withdrawal was filed. Brubaker also employed a professional consultant, Maynard Ayler, to analyze and evaluate the claims.

Ayler testified at length about his samplings and the conclusions he drew from the assay results. As the Judge found, "In his own mind he established beyond doubt the existence of massive deposits and the presence of high-grade beds." (Dec. 11). Ayler's testimony was of great importance since he testified on the results of the core hole drilling which had occurred and the conclusions to be drawn therefrom. These conclusions were visually presented in Exhibits 24 and 25. From his analysis Ayler concluded that the high-grade beds would extend a mile or more in depth (Tr. 906-909).

We make the following further observations on the evidence adduced. We note that Roberts, when testifying, admitted that his estimate of reserves present within the limits of the claims was based solely on chemical grade and that "on the basis of the assay certificate and on what I recall in my memory of the extent of the exposure and the ground, a metallurgical grade exists possibly ten times in amount of what I found in the chemical grade" (Tr. 137). We note further that Roberts agreed that blending of deposits to upgrade them is practiced in the majority of mining materials (Tr. 260-261), while Herbert D. Hendricks, another witness for contestant, stated: "And as for blending you can't blend. It is pretty hard to blend stone." (Tr. 1497). MacIntosh testified that his estimate of $7.00 a ton was a "ball park" estimate and he elaborated as follows: "I mean when I say seven dollars, it might be $7.50 or $6.50 or farther than that off" (Tr. 1172).

Contestant, in its appeal, focuses on other statements of the contestees. Thus, Peaker declared that "We need to do a lot more exploratory work" (Tr. 699). Further, he admitted that he had never seen a bed of limestone that went down three or four thousand feet (Tr. 688), in apparent contradiction of Ayler who testified that the bed would probably extend a mile in depth (Tr. 909).

(fn. 4 Cont.)

"We are awaiting adjudication on Colorado Contest 425, Avenger No. 1, et al lode mining claims which cover much of the Woodland Park-Crystola area. The results of the decision will have a great bearing on our evaluation of the lands proposed for withdrawal." (Exhibit M-12).

The Regional Forester apparently forgot that he had approved Roberts' Mining Report on May 15, 1969, when he was Assistant Regional Forester, and therefore neglected to inform the State Director, BLM, of its contents.

Additionally, Ayler stated that the mineral claimants have not determined what the market requirements are (Tr. 868), and later admitted that there was no present market for the limestone from these claims in the production of cement (Tr. 1373).

Before discussing any of the problems which this evidence engenders, certain observations are in order as to the showing required in a mining contest. As has been stated innumerable times before, a discovery exists "where minerals have been found and the evidence is such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *." Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

This "prudent-man" test has been refined by a requirement that a showing be made that the mineral can be extracted, removed and marketed at a profit. United States v. Coleman, supra. It is also necessary to show that a discovery has been made on each claim. See United States v. Bunkowski, 5 IBLA 102, 120, 79 I.D. 43, 51-52 (1972); United States v. Melluzzo, 76 I.D. 181, 189 (1969); United States v. Chas. Pfizer & Co., Inc., supra, at 351-352 (1969).

This latter point is a problem of some seriousness in the case at bar as the testimony adduced was seldom directed toward the issue of discovery on individual claims. The Judge declared that: "[o]n the basis of the evidence in the record, whether a given sample or outcrop is within one claim or another cannot be determined. References can only be made in terms of deposits with the claims as a whole." (Dec. 2-3). This statement is sharply disconsonant with the Judge's holding that certain claims were valid. It is clear that this decision was a result of another finding of the Judge that: "[t]he mineral for which the claims are located is limestone, which outcrops at the surface and occurs in beds which have an observable course through Avenger Nos. 1, 2, 7, 8, 9, 10, 11 and 12." (Dec. 16). Both contestant and contestees contend that if any of the claims are valid, all of the claims are valid. We expressly reject such a theory of bulk validation. In order for any claim to be valid, it must be shown that not only a mineral deposit has been found on a claim, but that the deposit on that claim is reasonably perceived as marketable at a profit. To put it more plainly, each claim must independently support a discovery. Charleston Stone Products, Inc., supra, at 108.

The Judge's difficulties in this case arose from the inability of contestant and contestees to agree on exactly where the claims were situated on the ground with respect to the deposit of limestone. A total of three maps were introduced, contestees' Exhibit 1, contestant's Exhibit G, and contestees' Exhibit M-1. It should be noted, however, that except for the fact that he disagreed with the showing of the deposit as extending into Avenger No. 1 as opposed to Avenger No. 7, contestant's witness Roberts agreed that contestees' Exhibit M-1 was accurate (Tr. 1427). But even accepting the accuracy of that map for the purpose of isolating the deposit within the claims, two separate findings are necessary to validate the claims: 1) it must be found that the deposit is of an uncommon variety of stone since the claims were located after July 23, 1955, and 2) it must be shown that the mineral has present marketability.

The Act of July 23, 1955, 69 Stat. 368, as amended 30 U.S.C. § 611 (1970) provides, in relevant part:

> No deposit of common varieties of sand, stone * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: * * * "Common varieties" as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value. * * *

The claims were located for limestone. The applicable regulation, 43 CFR 3711.1(b) provides, inter alia, that: "[l]imestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not `common varieties'." Thus, in order for a claim located for limestone after July 23, 1955, to be valid, the limestone must be either chemical grade, metallurgical grade or of a grade suitable for the production of cement. The obvious question is what qualities are necessary within a limestone deposit to make it of a grade sufficiently high to remove it from the proscriptions of the Act.

As regards chemical grade, this Department wrestled with this problem on a number of occasions and in United States v. Chas. Pfizer & Co., Inc., supra, at 342-43, held that "limestone containing 95 percent or more calcium and magnesium carbonates is an uncommon variety of limestone which remains subject to location under the mining laws." As regards the presence of 95 percent or more carbonate stone on the claims at issue, Exhibit M-18

shows the assay results as derived from the four core holes for various depth intervals. On the basis of the tabulated results we agree that chemical grade limestone is present on certain claims, namely, Avenger Claims Nos. 9 and 10 as shown on Exhibit M-1. Furthermore, we note that the Government assays of various samples (Exhibits C to E) show the presence of chemical grade limestone on Avenger Claims Nos. 7, 8, 10, 11, and 12. The problem with these latter assay results is determining whether in point of fact contestant's map (Exhibit G) coincides with contestees' second map (Exhibit M-1).

Additionally, as we have previously indicated, the mere fact that the deposit is an uncommon variety of stone does not make it per se marketable. It is also incumbent that the mineral claimants show that the deposit within each claim is marketable at a profit, United States v. Lease, 6 IBLA 11, 24, 79 I.D. 379, 385 (1972). We cannot say that this showing was made here.

The record is replete with statements by the contestees that they cannot now satisfy the marketability requirement. (E.g., Tr. 628, 699, 868). Additionally, Brubaker, one of contestees, stated, in response to a question on whether there would be a reasonable prospect of success if he were limited to mining only the chemical and metallurgical grades, that: "Well, I think it would be more questionable. I don't think I would be in a position because I have not looked at it in those terms." (Tr. 999-1000). This is an extremely crucial point. Under the Pfizer doctrine a mineral claimant whose claim embraces deposits of both common and uncommon varieties of minerals cannot aggregate the profits returned from mining the common variety and the profits netted from mining the uncommon variety to show marketability, but must treat the common variety as waste material of no value, even though it is essential that he mine it in order to reach the deposit of locatable minerals. As the Pfizer decision noted: "To hold otherwise would be to permit the easy frustration of the Congressional intent to bar location of common varieties after July 23, 1955." Id. at 349. See also United States v. Chas. Pfizer & Co., Inc. (On Reconsideration), 6 IBLA 514 (1972); United States v. Lease, supra. This factor creates an ore-waste ratio, according to Adams, of 1 to 9, requiring that the expense of mining be limited to 33 cents a ton (Tr. 1109).

Regarding transportation costs, a factor which is crucial to a determination of marketability, we note that no evidence was adduced which clearly focused on the expected costs of transporting contestees' limestone to potential markets vis-a-vis competitor's costs of transportation. Cf. United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 307-309, 80 I.D. 538, 550-551 (1973).

Contrariwise, the very fact that the Department of Agriculture felt obliged to seek a court order enjoining contestees from entering upon the claims and removing minerals for the purpose of testing the marketability of the deposit is probative of contestees' bona fides in development. And by the same token, we note that the court order which was obtained by the Forest Service certainly made it more difficult, if not impossible, for contestees to prove whether or not they had perfected a discovery. We have special reference to the decision of the Ninth Circuit Court of Appeals in United States v. Barrows, 404 F.2d 749 (1968) wherein the court discussed a question closely parallel to that before us:

> Defendants argued orally to this court, but not in their briefs nor, apparently, in the trial court, that if they are restrained by court process from continuing the sand and gravel operation, they will lose what they now contend to be a valid claim. They predicate this contention on the asserted fact that continued validity of the mining claim depends upon continued marketability of the sand and gravel. In response, counsel for the Government told this court, at oral argument, that if defendants had a valid claim when the injunction order was entered, it would be "completely unreasonable" for the Government to urge that loss of a market for the sand and gravel resulting from such injunction would prejudice the validity of the claim. We agree, and hold that the Government-sought temporary injunction may not be permitted to prejudice defendants' asserted rights in this way. (Emphasis added).

We have held that notation of the application for withdrawal did not foreclose the right of the claimants to take samples or other evidence to prove the existence of a discovery on each claim prior to the date of the notation of the application for withdrawal. This right of the claimants was effectively negated by the Government's attorneys when they obtained a restraining order. We find, therefore, that contestees have not made a showing of marketability, but we find as well that sufficient justification exists for this failure so that we are not disposed to rule finally on the case in its present posture. Accordingly, we vacate the judgment of the Judge as to discovery or lack thereof on all of the claims, and remand for further hearing by the Judge. At this hearing the parties are directed to present evidence in such a manner as to show discovery as it relates to individual claims, and to show marketability as of July 18, 1968, with far greater evidence than has thus far been presented. As a logical corollary we request that the attorneys for contestant move to have the restraining order dissolved to

the extent that it prevents contestees from entering upon the land and removing material for testing as opposed to large-scale production. Further, provision should be made for the protection of the aesthetic values of the land to as great an extent as possible consistent with the removal of rock for sampling, subject to a final determination of the validity of these claims.

The Judge is directed to write a recommended decision on all issues necessary to a discovery as outlined above. This Board will award the case expedited consideration when that decision is received.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case files are remanded for further action not inconsistent with this decision.

Douglas E. Henriques, Member

We concur:

Frederick Fishman, Member

Anne Poindexter Lewis, Member

APPENDIX A

Answers to Paragraphs (1)-(11) of 43 CFR 2311.1-1
Bureau of Land Management (where applicable)

1. Applicant Agency--Department of Agriculture, Washington, D. C.
Using Agency--Forest Service, Kaniksu National Forest.

2. Land Descriptions--Enclosed.

3. Act of February 28, 1958--Not applicable here.

4. Gross and Net Acreage--105.83 acres.

5. Purposes--Campground area and administrative site.

6. Contamination--No increase will be caused by this use.

7. Tenure--Permanent.

8. Effect of Use--The area will be fully utilized for all its resources where not inconsistent with its use as a campground area and an administrative site.

9. Use of Water--The right to use of water for National Forest purposes on lands described in this proposal for withdrawal was reserved to the United States upon establishment of the former Cabinet National Forest.

10. Justification--Statements enclosed.

11. Authority--Executive Order 10355 of May 26, 1952 (17 F.R. 4831).